Ferco Seating Systems (M) Sdn Bhd v The Product People Pty Ltd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–22–393 OF 2007
TENGKU MAIMUN J
10 OCTOBER 2008

Civil Procedure — Injunction — Anti-suit injunction — Interim anti-suit injunction granted to restrain defendant from pursuing proceedings in Australia — Whether anti-suit injunction ought to be made permanent — Judgment entered against defendant in Malaysia — Whether defendant should be permanently restrained from proceeding with suit in Australia

Civil Procedure — Judgment — Default of defence — Application to set aside writ and statement of claim disallowed — Failure by defendant to file defence or ask for extension of time to do so — Whether plaintiff entitled to enter judgment pursuant to the Rules of the High Court 1980 O 19 r 7

The plaintiff had on 10 April 2007 filed a suit against the defendant, a company incorporated in Australia for an alleged wrongful termination of a licence deed. The writ and the statement of claim was served on the defendant on 18 May 2007 in Kuala Lumpur. The defendant filed a conditional appearance and applied to set aside the writ and the statement of claim and the service thereof on the ground that the issuance and the service of the writ on the defendant was without leave of the court pursuant to O 11 of the Rules of the High Court 1980 ('RHC') and was therefore bad in law. It was also contended that the court had no jurisdiction as parties had agreed to submit to the jurisdiction of the courts in New South Wales. The application was allowed by the learned deputy registrar. The plaintiff's appeal to the judge in chambers against the said decision was allowed and the defendant's appeal to the Court of Appeal was dismissed on 25 June 2008. The plaintiff on 18 March 2008 obtained an interim anti-suit injunction restraining the defendant from, inter alia, proceeding with the New South Wales proceedings. Vide encls 48 and 51, the plaintiff sought respectively, to enter judgment in default of defence against the defendant and for an order that the interim anti-suit injunction made against the defendant be made permanent.

Held, allowing the plaintiff's application:

(1) Since the defendant's appeal to the Court of Appeal had been dismissed and since there was no stay and the defendant had not filed in the defence and has not asked for an extension of time to do so, the plaintiff was entitled to enter judgment pursuant to O 19 r 7 of the RHC (see para 9).

(2) The anti-suit injunction should follow the judgment and since judgment was entered against the defendant, the anti-suit injunction should be made permanent. Since the court had entered judgment against the defendant for, inter alia, an injunction that the defendant was restrained from taking any steps to enforce the termination notice, it followed that the issue of forum convenience was irrelevant and the defendant should be permanently restrained from proceeding with the suit in the New South Wales (see para 10).

[Bahasa Malaysia summary

Plaintif, pada 10 April 2007 memfailkan guaman terhadap defendan, sebuah syarikat yang ditubuhkan di Australia kerana secara salah menamatkan lesen surat ikatan. Writ dan pernyataan tuntutan diserahkan kepada defendan pada 18 Mei 2007 di Kuala Lumpur. Defendan memfailkan kehadiran bersyarat dan memohon untuk mengetepikan writ dan pernyataan tuntutan dan penyampaiannya atas dasar bahawa writ dan penyampaiannya dikeluarkan tanpa kebenaran mahkamah menurut A 11 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan oleh itu menyalahi undang-undang. Ia juga menghujah bahawa mahkamah tidak mempunyai bidang kuasa memandangkan pihak-pihak telah bersetuju untuk patuh kepada bidang kuasa mahkamah di New South Wales. Permohonan ini dibenarkan oleh timbalan pendaftar yang bijaksana. Rayuan plaintif kepada hakim dalam kamar terhadap keputusan tersebut dibenarkan dan rayuan defendan kepada Mahkamah Rayuan ditolak pada 25 Jun 2008. Plaintif, pada 18 Mac 2008 mendapatkan satu injunksi interim anti-guaman menghalang defendan daripada meneruskan prosiding di New South Wales. Melalui lampiran 48 dan 51, yang dipohon oleh plaintif, untuk memasukkan penghakiman ingkar pembelaan terhadap defendan dan untuk perintah bahawa injunksi interim anti-guaman yang dibuat terhadap defendan dijadikan kekal.

Diputuskan, membenarkan permohonan plaintif:

(1) Memandangkan rayuan defendan kepada Mahkamah Rayuan telah ditolak dan memandangkan tidak terdapat penggantungan dan defendan tidak memfailkan dalam pembelaan dan tidak memohon

lanjutan masa untuk berbuat demikian, maka plaintif berhak untuk memasukkan penghakiman menurut A 19 k 7 KMT (lihat perenggan 9).

(2) Injunksi anti-guaman perlu mengikut penghakiman dan memandangkan penghakiman telah dimasukkan terhadap defendan, injunksi anti-guaman perlu dijadikan kekal. Memandangkan mahkamah telah memasukkan penghakiman terhadap defendan untuk satu injunksi bahawa defendan dihalang daripada mengambil apa-apa langkah untuk menguatkuasakan notis penamatan, oleh itu isu mengenai forum convenience adalah tidak relevan dan defendan perlu dihalang secara kekal daripada meneruskan guaman di New South Wales (lihat perenggan 10).]

Notes

For a case on anti-suit injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2864.

For cases on default of defence, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3881–3893.

Legislation referred to

Rules of the High Court 1980 O 11, O 12 r 7, O 19 r 7, 7(1), (2), (3), (4), (5), O 92 r 4

Liew Teck Huat (TH Liew & Partners) for the plaintiff.
Gurubachan Singh Johal (Nashir Johal & Co) for the respondent.

Tengku Maimun J:

[1] The plaintiff had on 10 April 2007 filed a suit against the defendant, a company incorporated in Australia for an alleged wrongful termination of a licence deed and claims for damages for breach of contract; a declaration that the defendant's notice of termination of the deed is defective, invalid, ineffective and null and void and for an injunction. The writ and the statement of claim was served on the defendant on 18 May 2007 at 22nd Floor, The Mall, Place Putra, 100, Jalan Putra, Kuala Lumpur.

[2] On 12 June 2007, the defendant filed a conditional appearance followed by an application on 25 June 2007 to set aside the writ and the statement of claim and the service thereof pursuant to O 12 r 7 of the Rules of the High Court ('RHC 1980') and/or under the inherent powers of the court pursuant to O 92 r 4 of the RHC 1980. The defendant's application to set aside the writ and service thereof is premised mainly on the ground that the issuance and the service of the writ on the defendant was without leave of the court pursuant to O 11 of the RHC 1980 and is therefore bad in law

and liable to be set aside and that this court has no jurisdiction as parties had agreed to submit to the jurisdiction of the courts in New South Wales. The application was allowed by the learned deputy registrar. The plaintiff's appeal to the judge in chambers against the said decision was allowed and the defendant's appeal to the Court of Appeal was dismissed on 25 June 2008.

[3] Vide encls 48 and 51, the plaintiff is seeking respectively, to enter judgment in default of defence against the defendant and for an order that the interim anti-suit injunction made against the defendant on 18 March 2008 be made permanent. The application in encl 48 is made pursuant to O 19 r 7 of the RHC 1980 and the grounds are that:

(a) the writ and statement of claim in this action were served on the defendant on 18 May 2007;

(b) the defendant entered a conditional appearance on 12 June 2007 disputing the validity and service of the writ and statement of claim;

(c) the defendant's application to set aside and/or strike out the writ had been dismissed by the Court of Appeal;

(d) after the decision of the Court of Appeal, the plaintiff's solicitors gave seven day's notice to the defendant's solicitors to file and serve its defence; and

(e) the seven day period has long expired without the defendant filing its defence.

[4] As for encl 51, the plaintiff's grounds are as follows:

(a) the plaintiff applied for and obtained an interim injunction herein on 24 May 2007 which restrains the defendant from taking any steps, whether in Malaysia or elsewhere, to terminate the deed ('the interim injunction');

(b) the interim injunction specifically precludes the defendant from terminating the deed pursuant to a notice of termination issued on 5 March 2007 pending the trial in this action or further order; the notice of termination of 5 March 2007, its scope and validity in the factual matrix therefore fell to be determined by this court at the trial of this action, not elsewhere;

(c) in breach of the interim injunction, on or about 7 December 2007, the defendant commenced proceedings against the plaintiff in the Supreme Court of New South Wales, Australia, asserting among other things, that the deed had been terminated by reason of the notice of termination of 5 March 2007 ('the NSW proceedings');

(d) the plaintiff contends that the commencement of the NSW proceedings was in breach of the interim injunction which infringes and undermines the protection granted to the plaintiff by this court by way of the interim injunction;

(e) the plaintiff therefore applied for, and on 18 March 2008, obtained an interim anti-suit injunction restraining the defendant from, inter alia, proceeding with the NSW proceedings;

(f) the defendant's position all along was that it was entitled to ignore these proceedings and any order made in it on the basis that this honourable court had no jurisdiction to hear this claim; it applied to set aside and/or strike out the writ and statement of claim;

(g) the application succeeded at first instance before the learned deputy registrar, but was reversed by the judge on appeal and the defendant's appeal to the Court of Appeal was dismissed on 25 June 2008; and

(h) the defendant has not filed its statement of defence despite the notice given by the plaintiff's solicitors and the plaintiff therefore has applied for judgment in default of defence be entered against the defendant. There will not now be a trial of this action and the anti-suit injunction made on 18 March 2008 should be made permanent.

[5] Enclosures 48 and 51 were fixed for hearing on 13 August 2008. In the meantime, the defendant has been represented by a new firm of solicitors and on 6 August 2008, a notice of change of solicitors was filed. On 30 July 2008, the new solicitors had written to the court asking for an adjournment of encls 48 and 51 on the ground that the cause papers had not been served on them by the previous solicitors Messrs Raja, Darryl & Loh and that the new solicitor handling the matter ie Mr Gurubachan Singh Johal of Messrs Nashir Johal & Co is overseas and will only be back on 19 August 2008 and they needed time to study the documents and the cause papers. The request for adjournment was opposed by the plaintiff's solicitors vide a letter dated 6 August 2008 on the grounds, inter alia, that both encls 48 and 51 were filed vide certificate of urgency; the action was instituted in May 2007 and had not passed the pleadings stage; the defendant's appeal to the Court of Appeal has been dismissed; the defendant was given notice to file defence but failed to do so; Messrs Nashir Johal & Co taking over the matter is not by itself a sufficient reason to adjourn the applications and Messrs Raja Darryl & Loh remains the solicitor on record as the order for discharge made on 4 August 2008 had not been extracted and served.

[6] The defendant's new solicitors, notwithstanding the assertion that the cause papers had not been served and the lawyer handling the matter is away, nevertheless filed the defendant's affidavits in reply on 12 August 2008. The

court did not give any direction that the application for adjournment vide the defendant's solicitor's letter be granted. However, when encls 48 and 51 came up for hearing on 13 August 2008, one Miss Sabarina appeared on behalf of the defendant's solicitors and requested for an adjournment. I find that there is no good reason to adjourn the matter despite the reasons stated in the letter of 30 July 2008, the defendant's affidavit in reply had in fact been filed (encls 57 and 58). I therefore proceeded with the hearing of encls 48 dan 51.

[7] Mr Liew Teck Huat, learned counsel for the plaintiff, submitted that the plaintiff's claim is a combination of reliefs for declaration, injunction and damages to be assessed and comes within O 19 r 7 of the RHC 1980. The defendant in encls 57 and 58, raised the defence that the writ and the statement of claim were not properly served and that this court has no jurisdiction to hear the matter. These issues contended that Mr Liew has been ventilated by the Court of Appeal and the defendant has not made any application for stay, pending appeal to the Federal Court and neither is there an application for extension of time to file the defence. Miss Sabarina who appeared on behalf of the defendant's solicitors was not in a position to make any submission.

[8] Order 19 r 7(1) provides:

> Where the plaintiff makes a claim against a defendant or defendants a claim or description not mentioned in rules 2 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.

(Rules 2–5 provide for situations where the plaintiff's claim is one for liquidated damages, unliquidated damages, detinue and a claim for possession of immovable property respectively).

[9] I am in agreement with learned counsel for the plaintiff that the issues raised by the defendant in the affidavit in reply (encls 57 and 58) concern the issuance and service of the writ and the statement of claim and the forum convenience. Since the defendant's appeal to the Court of Appeal has been dismissed and since there is no stay and the defendant has not filed in the defence and has not asked for an extension of time to do so, the plaintiff in my view is entitled to enter judgment pursuant to O 19 r 7 of the RHC 1980. I therefore granted an order in terms of encl 48.

[10] As for encl 51, learned counsel for the plaintiff submitted that the anti-suit injunction should follow the judgment and since judgment is

entered against the defendant, for the avoidance of doubt, the anti-suit injunction should be made permanent. I agree with the plaintiff. Since the court has entered judgment against the defendant for, inter alia, an injunction that the defendant is restrained from taking any steps to enforce the termination notice, it follows that the issue of forum convenience is irrelevant and the defendant should be permanently restrained from proceeding with the suit in the New South Wales. Enclosure 51 was accordingly allowed as prayed.

Plaintiff's application allowed.

Reported by Kanesh Sundrum